

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of)	DOCKET NO. A10-787
)	
MAUI R&T PARTNERS, LLC)	PETITIONER'S RESPONSE TO OFFICE
)	OF PLANNING'S COMMENTS AND
To Amend the Land Use District)	OBJECTIONS TO PETITIONER'S
Boundary of certain lands situated at)	PROPOSED FINDINGS OF FACT,
Kihei, Island of Maui, State of Hawai'i,)	CONCLUSIONS OF LAW, AND
consisting of 253.05 acres from the)	DECISION AND ORDER, FILED
Agricultural District to the Urban)	SEPTEMBER 25, 2013
District, Tax Map Key Nos.)	
(2) 2-2-024:016 and 017, and)	
(2) 2-2-002:084 (por.))	
_____)	

**PETITIONER'S RESPONSE TO OFFICE OF PLANNING'S
COMMENTS AND OBJECTIONS TO PETITIONER'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
DECISION AND ORDER, FILED SEPTEMBER 25, 2013**

AND

CERTIFICATE OF SERVICE

LAND USE COMMISSION
STATE OF HAWAII
2013 OCT -3 A 10:40

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Comes now, Petitioner MAUI R&T PARTNERS, LLC ("Petitioner"), by and through its attorneys, MATSUBARA - KOTAKE, and hereby submits Petitioner's Response to Office of Planning's Comments and Objections to Petitioner's Proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed September 25, 2013.

I. FINDINGS OF FACT

1. Impact Upon Resource of the Area

Petitioner does not oppose the Office of Planning's ("OP") proposed **Finding of Fact ("FOF") 86A.**

2. Noise

Petitioner opposes OP's proposed FOF 138A. The proposed FOF 138A references Federal and State noise standards that do not apply to the Maui Research & Technology Park Master Plan Update ("Project"). Federal and State noise standards have been discussed for illustrative purposes but do not constitute a compliance issue. There are no noise standards that say if you exceed that level then you cannot build your project. [Testimony of Yoichi Ebisu on July 25, 2013, page 136, line 20 through page 137, line 3 ("Y. Ebisu, 7/25/13, 136:20 - 137:3")]

Because the Federal and State noise standards do not apply to the Project with any force of law, it is inappropriate to include said standards in the findings of facts.

3. Highways

Petitioner opposes OP's request to delete Petitioner's proposed FOF 166. FOF 166 states "The Mauka Collector Road is not included in the current STIP as it is not anticipated to be necessary for many years." As OP points out, the State Transportation Improvement Program ("STIP") is a program that only includes near term projects. Petitioner's proposed FOF 166 accurately states this fact.

Petitioner opposes OP's revisions to Petitioner's proposed FOF 175.

OP's first revision to FOF 175 would require Petitioner to obtain the State Department of Transportation's ("DOT") acceptance of the future revised Traffic Impact Assessment Report ("TIAR") prior to County zone change approval.

DOT's proposed timing of the revised TIAR is unrealistic and unworkable. Petitioner's application for change in zoning and Community Plan Amendment for the Project have been *filed and are currently pending* and being held in abeyance until this petition for district boundary amendment is completed. [J. Maydan, 7/25/13, 144:18 - 144:24]

In other words, there is no new or additional information that can be used to create a revised TIAR prior to zone change. The County will have the same information that the Land Use Commission, State of Hawai'i ("Commission") has with respect to traffic impacts, and the fact that the DOT has not yet accepted Petitioner's TIAR means that the County would be stripped of its rightful authority to proceed with and decide the pending County applications due to DOT's proposed timing of the revised TIAR.

OP's proposed language constitutes an infringement upon the County's zoning authority by creating, through a Land Use Commission order, a new veto power over the zone change process to be wielded by DOT. Zoning powers are granted to the Counties pursuant to Section 46-4 of the *Hawai'i Revised Statutes*. The decision to allow zone change approval is held exclusively by the Counties. The DOT, or any other agency of the State, lacks the legal authority to prevent the granting of a zone change request. The Maui County Council's power to grant a zone change request should not be infringed.

The written testimony of Honglong Li makes clear that DOT acceptance of the revised TIAR should occur no sooner than final subdivision approval of lots intended for above ground construction, excluding roads, utilities and infrastructure; that the Project needs enough time to mature to the point of having the requisite details and specifications needed to provide DOT with an acceptable revised TIAR. [Pet. Ex. 40]

The fact that Petitioner's application for change in zoning is already pending, and the fact that DOT has not yet accepted Petitioner's TIAR proves that zone change is too early in the entitlement process for requiring acceptance of the TIAR.

OP's second proposed change to Petitioner's proposed FOF 175 is to require execution of the Memorandum of Agreement ("MOA") prior to tentative subdivision approval. As described above, the Project needs to progress to the point where there is sufficient details to draft an acceptable revised TIAR which, in turn, constitutes the technical support for the MOA. Premature and arbitrary deadlines only create immovable roadblocks that necessitate amendments and modifications and needless burden on both applicants and regulatory agencies.

Petitioner opposes OP's proposed deletion of Petitioner's proposed FOF 177. OP does not provide any basis for deleting FOF 177 except to say that it does not reflect DOT's recommendations and requirements. Such statements are conclusory, lacks probative value and cites to no applicable rule of law.

Petitioner opposes OP's proposed FOF 177A, 177B, 177C, 177D and 177E. Said FOF's are subject to the future revised TIAR, are preliminary, prejudicial, and should not be memorialized as FOF's.

Petitioner opposes OP's proposed FOF 177F. FOF 177F includes DOT's recommendation that the Liloa Drive Extension (the Makai Collector Road) be completed and operational prior to Final Subdivision Approval being granted for Phase 1. There is no evidence to support this conclusion.

The TIAR for the Project examines an acceptable level of service for the area in Scenario 4. Scenario 4 includes the Liloa Drive Extension by year 2024. DOT's FOF 177F would require the Liloa Drive Extension to "be completed and operational" in year 2014, when Petitioner hopes to be seeking subdivision approval. It is unreasonable for DOT to require the completed construction of the Liloa Drive Extension *10 years ahead of schedule*.

In addition, FOF 177F has additional factual errors where it states that the Liloa Drive Extension is not in the Maui Island Plan. The Liloa Drive Extension is within the Maui Island Plan. [Pet. Ex. 40] Furthermore, FOF 177F is misleading in stating that the Liloa Drive Extension is not in the STIP. The STIP is a three year program, but the Liloa Drive Extension is not included in the STIP because the Liloa Drive Extension project's timeframe is beyond the current STIP. [Pet. Ex. 40]

Petitioner opposes OP's proposed FOF 177G for similar reasons. FOF 177G includes DOT's recommendation that the Mauka Collector Road and the Kihei Upcountry Highway (which is not even located near the Project) be completed and operational prior to Final Subdivision Approval being granted for Phase 2. There is no evidence to support this conclusion.

The TIAR for the Project examines an acceptable level of service for the area in Scenario 4. Scenario 4 includes the Mauka Collector Road by year 2034. DOT's FOF 177G would require the completion of the Mauka Collector Road at least 10 years ahead of schedule.

Also, FOF 177G is incorrect where it states that the Mauka Collector Road is not in the Maui Island Plan. The Maui Island Plan contemplates a future north south roadway in several sections with potential alignments. [Pet. Ex. 40] Furthermore, FOF 177G is misleading in stating that the Mauka Collector Road is not in the STIP. The STIP is a three year program, whereas the Mauka Collector Road is not included in the STIP because the Mauka Collector Road is not anticipated to be necessary for many years beyond the STIP's three year time horizon. [Pet. Ex. 40]

Petitioner does not oppose OP's proposed FOF 177H.

Petitioner opposes OP's proposed FOF 177I and 177J. FOF 177I states that there is sufficient information to accept a TIAR at zone change. DOT's own action in not accepting the TIAR at this time when Petitioner's zone change application is currently

pending, however, proves that FOF 177I is false. FOF 177I speaks to the MOA deadline and fails for the same reasons discussed above.

V. DECISION AND ORDER

Petitioner opposes OP's proposed Highway and Roadway Improvements Condition. OP's proposed condition is broken down into Parts A, B, C, D and E.

Part A requires acceptance of the TIAR prior to zone change approval. As discussed above, such a requirement is without justification, unreasonable, premature, inappropriately infringes upon the County's authority to decide zone changes, and is contradicted by DOT's own action by not accepting the TIAR while Petitioner's application for zone change is currently pending with the County.

Part E requires executing the MOA prior to tentative subdivision approval. Again, this requirement is arbitrary, premature and prejudicial, as discussed above.

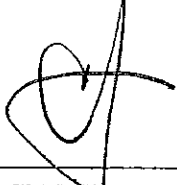
Parts B, C and D describe Petitioner's responsibilities in funding and constructing transportation improvements, determining regional fair share contributions, and payment for access rights. These subjects should be included in the future MOA as negotiated items. A review of Petitioner's proposed Highway and Roadway Improvements Condition demonstrates the normal practice of the Commission to allow the Petitioner and DOT to negotiate matters relating to transportation improvements, determining any proportional regional impacts, and any

other fees. Petitioner's proposed condition is based on the Commission's recent Docket No. A10-789 for the A&B Properties, Inc.'s Wai'ale Project.

Parts B, C and D of OP's proposed Highway and Roadway Improvements Condition bypasses the MOA process of negotiating the funding and construction of transportation improvements, the determination of proportional regional impacts, and payment of access rights, and deprives Petitioner the ability to negotiate the terms and conditions of matters traditionally included in the MOA.

DATED: Honolulu, Hawai'i, October 3, 2013.

Of Counsel:
MATSUBARA - KOTAKE
A Law Corporation



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_____)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following by depositing the same in the AS INDICATED BELOW on October 3, 2013:

JESSE SOUKI, Director
Office of Planning, State of Hawai'i
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RECEIPT REQUESTED)

Planning Commission
County of Maui, State of Hawai'i
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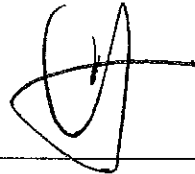
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DATED: Honolulu, Hawai'i, October 3, 2013.

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